In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-427

EVELYN WILLIAMS, PETITIONER

v.

LEE P. GAGLIARDI, UNITED STATES DISTRICT JUDGE, SOUTHERN DISTRICT OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

In a summary proceeding pursuant to 18 U.S.C. 401 and Rule 42(a), Fed. R. Crim. P. petitioner was held in contempt of court in the United States District Court for the Southern District of New York for two acts committed during the trial of a client whom she represented. She was sentenced to ten days' imprisonment (Pet. App. 1a-3a, 8a). The court of appeals affirmed (Pet. App. 9a-12a).

Petitioner served as attorney for Joanne Chesimard, a defendant in a criminal trial before Lee P. Gagliardi, United States District Judge, Southern District of New York, in December 1973. During the jury selection on December 4, Chesimard continually interrupted the proceedings, complaining that additional time was required

to prepare her defense.[1] She disregarded Judge Gagliardi's orders to be silent and instead accused the judge of having made a corrupt deal to "railroad" her (Tr. of Dec. 4, 1973, pp. 40-79).[2] When Chesimard indicated that she would not heed petitioner's advice to remain silent, Judge Gagliardi directed that Chesimard be removed from the courtroom until she could agree personally or through her attorney that she would conduct herself properly. Petitioner then announced that she would not participate in the proceedings in the absence of her client (*id.* at 80-82).

Petitioner then refused to obey Judge Gagliardi's order to be seated, saying, "I take exception to the Court's ruling, and I will not sit here, and I will not submit to that direction of the Court." While insisting that she continued to represent Chesimard, petitioner notified the court that she would not participate in the proceedings and that she intended to leave the courtroom. Judge Gagliardi warned her that he would take appropriate measures to deal with her contumacious conduct, and petitioner left the courtroom without reply (*id.* at 84-87). The trial was then adjourned until the next morning at 9:30 A.M.

Petitioner did not appear at court the next morning, but she was contacted during the morning and directed to be in court at 2 P.M. That afternoon, as the jury selection continued, Chesimard again interrupted, accusing the court of "racism" (Tr. of Dec. 5, 1973, p. 27).

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[1]Prior to trial, the court had denied a defense motion for a second adjournment.

[2]The cited transcripts are included in petitioner's appendix in the court of appeals. A copy has been filed with the Clerk of this Court.

Judge Gagliardi again ordered Chesimard removed from the courtroom after ascertaining that the outbursts would continue notwithstanding petitioner's advice to her client (*id.* at 27-31). Chesimard was later readmitted to the court, where she immediately resumed her disruptive conduct, accusing the judge of being "an agent of the CIA" (*id.* at 39). The court again ordered her removed (*id.* at 40-41).

Petitioner complained that the removal of her client was "unconstitutional" (*id.* at 50). Petitioner then refused to obey the court's order that she be seated, stating (*id.* at 51):

> I will not be seated without the presence of the defendants whose lives, whose liberty is in jeopardy in this case without their presence in this court. * * * I will not be seated and I will not listen to any statement made by this Court * * * .

She acknowledged Judge Gagliardi's warning that she could be held in contempt, but declined to purge herself (*id.* at 53). The judge then asked petitioner whether she wished to explain her contumacious conduct. Petitioner denied that her conduct was contumacious, and the judge then adjudicated her to be in contempt. Petitioner continued to refuse to return to the counsel table (*id.* at 54). In a certificate dated the same day, Judge Gagliardi certified that contumacious conduct had occurred in his presence, consisting of the two incidents described above (Pet. App. 1a-3a). Sentencing was deferred until the conclusion of Chesimard's trial (Pet. App. 4a).

Petitioner contends that she was improperly denied proper notice of the contempt charges and a hearing before a different judge.

1. The use of the summary contempt power in the instant case was entirely proper. Petitioner's misconduct took place in the "actual presence of the court" and constituted both disobedience to the court's lawful orders and misbehavior tending to "obstruct the administration of justice." Rule 42(a), Fed. R. Crim. P.; 18 U.S.C. 401(1), (3). There was no need for an independent hearing, because all of the relevant facts were known to the court at the time the adjudications were made. *Sacher* v. *United States,* 343 U.S. 1, 9; see also *Carlson* v. *United States,* 209 F. 2d 209 (C.A. 1). Moreover, petitioner was afforded "an opportunity to speak in [her] own behalf in the nature of a right of allocution." *Groppi* v. *Leslie,* 404 U.S. 496, 504. Petitioner suggests no facts unknown to Judge Gagliardi at the time of the contempt that might have become known had the hearing been postponed. Indeed, the only justification she offered for her conduct was that it was not contumacious.

The fact that sentence was not pronounced until the conclusion of the trial did not extinguish the judge's power to proceed summarily. Punishment following a summary contempt adjudication may properly be deferred, in the court's discretion, when necessary due to "the exigencies of the trial." This is particularly true where, as here, the contemnor is an attorney representing a client whose interest might be prejudiced by immediate sanctions. *Sacher* v. *United States, supra,* 343 U.S. at 10-11. As this Court recently said in *Taylor* v. *Hayes,* No. 73-473, decided June 26, 1974 (slip op. p. 9):

> Our decisions establish that summary punishment need not always be imposed during trial if it is to be permitted at all. In proper circumstances,

particularly where the offender is a lawyer representing a client on trial, it may be postponed until the conclusion of the proceedings.[3]

2. Nor is it true, as petitioner contends (Pet. 28), that the Certificate of Contempt comprehended charges of which she had no notice.[4] The "acts, statements and conduct" cited in the Certificate of Contempt refer to petitioner's conduct in disobeying the court's orders to resume her seat and to discontinue her attempts to leave the courtroom during the jury selection. While the court evidently believed this conduct to be part of a general effort by petitioner to obstruct the proceedings, the specific conduct detailed in the Certificate of Contempt was clearly the only basis actually used by the court in adjudicating the contempt and fixing punishment (Pet. App. 1a-3a, 5a). Since petitioner did not suggest that the charge was "vague" either at the time of sentence, at the time of her subsequent motion for rehearing before another judge, or in her brief in the court of appeals, it can fairly be inferred that petitioner understood the specific charges against her and that her present argument is a mere afterthought.

3. Petitioner also errs in her assertion that Judge Gagliardi was so personally involved in her contumacy that she was entitled to a hearing before another judge. The court of appeals concluded (Pet. App. D. 12a):

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[3]In *Taylor*, however, the contempt convictions were reversed because no "final adjudication of contempt was entered until after the verdict was returned" (slip op. p. 8) and the attorney was given no opportunity to respond to the charges. Here, a formal finding was made on the day of the second contempt, and petitioner declined to purge herself or defend the contumacious conduct.

[4]This issue was raised for the first time in oral argument before the court of appeals (Pet. App. 12a).

> However, on reading the record it is clear to us that Judge Gagliardi was not personally embroiled in any dispute with Williams. He exhibited patience and restraint in the face of stratagems calculated to bring the trial to a halt. Judge Gagliardi used the district court's summary contempt power only as a last resort to prevent Williams from in effect terminating the trial. His action was a perfectly appropriate response to an immediate challenge to the court's dignity and authority.

While petitioner's client engaged in vilification of the judge personally, petitioner did not do so, and there is no indication in the record that the trial judge ever imputed to petitioner her client's conduct. Petitioner's misconduct consisted solely of willful disobedience of the court's orders. This Court has stated its unwillingness "to bottom a constitutional rule of disqualification solely upon such disobedience to court orders and criticism of its rulings during the course of a trial. * * * We cannot assume that judges are so irascible and sensitive that they cannot fairly and impartially deal with resistance to their authority or with highly charged arguments about the soundness of their decisions." *Ungar* v. *Sarafite*, 376 U.S. 575, 584 (citation omitted). There is not the slightest indication in the record that Judge Gagliardi was unable or unwilling to treat petitioner with complete impartiality.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.[5]

ROBERT H. BORK,
Solicitor General.

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[5]There is no need to hold the instant petition pending a decision in *United States* v. *Wilson*, No. 73-1162, which concerns the use of the summary power to punish testimonial recalcitrance.